PD-0797-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/8/2017 1:43 PM
Accepted 11/8/2017 2:26 PM
DEANA WILLIAMSON
CLERK

No. PD-0797-17

FILED
COURT OF CRIMINAL APPEALS
11/8/2017
DEANA WILLIAMSON, CLERK

In the Court of Criminal Appeals of Texas

DAVID ARROYO,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Brief on the Merits
from the
Fourth Court of Appeals, San Antonio, Texas,
No. 04-15-00595-CR
Appeal from Bexar County

NICHOLAS "NICO" LaHOOD
Criminal District Attorney
Bexar County, Texas

ANDREW N. WARTHEN
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva
San Antonio, Texas 78205
(210) 335-1539
State Bar No. 24079547
awarthen@bexar.org

Attorneys for the State of Texas, Petitioner

IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the **Honorable Ray Olivarri**, Presiding Judge of the 399th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **David Arroyo** was the defendant in the trial court and appellant in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) David Arroyo was represented by **Monica Guerrero** and **Rochelle M. Acevedo**, 5150 Broadway Street, Suite 114, San Antonio, TX 78209.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Meredith Chacon** and **Grant Bryan**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, Fourth Floor, San Antonio, TX 78205.

The appellate attorneys to the Fourth Court of Appeals were as follows:

1) David Arroyo was represented by **Andrea C. Polunsky**, 111 Soledad, Suite 332, San Antonio, TX 78205.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Laura E. Durban** and **Andrew N. Warthen**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

The State of Texas is represented in this petition by **Nicholas "Nico" LaHood**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Other Sources

STATEMENT OF THE CASE

Appellant was indicted on six counts of indecency with a child. In addition to three counts alleging that appellant touched the genitals of K.E., counts two, four, and six alleged that he touched her breast. (CR 5-6.)[1] After a jury trial, appellant was convicted of all six counts and sentenced to 20 years' imprisonment and a $5,000 fine, with counts one through five to run concurrently with each other and count six to run consecutively to the others. (CR 67-78; RR5 45-46, 60, 63-64.)

Appellant appealed. On May 24, 2017, the court of appeals handed down its original opinion. On June 1, 2017, the State filed a motion for rehearing. On July 19, 2017, the court of appeals overruled the State's motion for rehearing, but it vacated its earlier judgment, withdrew its original opinion, and issued a new judgment and opinion. *Arroyo v. State*, No. 04-15-00595-CR, 2017 Tex. App. LEXIS 6632 (Tex. App.—San Antonio July 19, 2017, pet. granted) (mem. op., not designated for publication). The court of appeals affirmed appellant's convictions relating to touching K.E.'s genitals, but it reversed the trial court's judgments on counts two, four, and six, rendering acquittals because it concluded that the evidence was legally insufficient.

[1] The Reporter's Record will be referenced as "RR," followed by its respective volume number. The Clerk's Record will be referenced as "CR."

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested and granted.

ISSUES PRESENTED

1. In light of significant statutory changes, does *Nelson v. State* have continued validity when interpreting § 21.11 of the Texas Penal Code?

2. Under § 21.11 of the Texas Penal Code, what is a "breast"?

STATEMENT OF FACTS

In 2005, F.E. and her two daughters—including the victim, K.E.—moved to San Antonio.[2] (RR4 32.) At one point they lived with F.E.'s parents in a house on Tropical Street. (RR4 33.) Appellant was a longtime family friend, and was "like a brother" to F.E. (RR4 34.) Because of his friendship with F.E.'s family, he had free rein of their home. (RR4 34-35.)

In 2006, when K.E. was around nine or ten, her grandfather passed away. (RR4 34, 36, 94.) The day of the funeral, the first incident of abuse occurred. (RR4 80.) K.E. and her uncle had gone to the house to retrieve her grandfather's handkerchief, which was to be placed in his casket. (RR4 81.) Appellant was at the house. (RR4 81.) While her uncle looked for the handkerchief in her grandfather's bedroom, K.E. sat on a bed, where appellant joined her. (RR4 81.) Her uncle could not find the handkerchief in the bedroom, so he left to go look for

[2] To protect the identity of the victim, her and her family members' initials are provided. In addition, in accordance with article 38.37, § 2 of the Code of Criminal Procedure, the jury heard from G.S., who appellant also abused. Her name is likewise represented by initials.

it elsewhere, while K.E. and appellant remained seated on the bed. (RR4 82.)

During that time, appellant told K.E. that her grandfather would be proud of her and his other grandchildren. (RR4 81-82.) As he had done at various times before that day, appellant then began to play with her hair and rub her neck. (RR4 80, 82.) K.E. testified, "And then he got more – he started touching my chest and it kind of – I'm crying, so I'm not – I don't know how to explain it. I knew it was wrong, I just didn't say anything at the time." (RR4 82.) She continued, "He started rubbing on my leg and he kept rubbing and then he went further up my skirt." (RR4 83.) She confirmed that appellant touched her vagina underneath her skirt and underwear, moving his hand on it "like how you would pet a cat . . . or an animal[.]" (RR4 83-84.) Thereafter, her uncle returned, and they went to the funeral. (RR4 83.)

On another day not long after the first incident, K.E. returned home from school and appellant was there. (RR4 85-86.) Inside, she began watching television on the living-room couch, where appellant joined her. (RR4 86.) Like before, appellant spoke with K.E. about her grandfather. (RR4 87.) K.E. testified,

> [W]e were just watching TV and then it started off the same, like he started with my hair, moved down my neck and then go down – just down my chest and then go back to the leg and then it goes back to underneath what I wore, which was a skirt again because that was part of my uniform.

(RR4 86.)

The last incident occurred at appellant's home. K.E. had forgotten her house key, and she went to appellant's house to retrieve the spare. (RR4 87-88.) She entered his house, where the two talked about music. (RR4 88.) K.E. explained, "Then it started off the same, started with my hair, to my face, to my neck, to my chest, down my leg, and back up to my skirt." (RR4 88.) She confirmed that appellant had gone inside her underwear and rubbed her as before. (RR4 88.)

When K.E. was sixteen years old, she made an outcry to F.E. (RR4 37-38, 41-42, 90.) F.E. then contacted the police. (RR4 40.)

At trial, pursuant to article 38.37 of the Code of Criminal Procedure, the jury heard from G.S., another of appellant's child victims. At the time she testified, G.S. was thirty-one years old. (RR4 62.) She explained that she also grew up on Tropical Street. (RR4 62-63.) During the time period, she knew appellant, who was a neighbor of hers. (RR4 63.) As with K.E.'s family, he was a friend of G.S.'s grandfather and would come around for family gatherings. (RR4 64.)

G.S. described four incidents in which appellant molested her, all occurring while she was in elementary school. (RR4 69-70.) During the first incident, she and appellant were in the backroom of her family home. (RR4 65, 66.) There, appellant "slid his hand up [her] shorts and through [her] underwear and touched" her vagina. (RR4 65.)

During another incident, appellant was playing with G.S. and her cousins in

the front yard. (RR4 66-67.) G.S. testified, "[H]e had his face in between my legs like moving his face around, or like smelling in between my legs before he put me on his shoulders." (RR4 67.) G.S. stated that it was a "rough sensation" and confirmed that she could feel appellant moving his face around. (RR4 67-68.)

During another incident, appellant was driving her and her cousins to the grocery store when he reached back to where G.S. was sitting and rubbed her vagina on the outside of her underwear. (RR4 68-69.)

The final incident took place inside appellant's home. G.S. had been riding a scooter outside, and appellant enticed her indoors. (RR4 70.) He took G.S. into the back corner room of his house, had her get on her hands and knees and face into a mirror, and placed his tongue inside her vagina. (RR4 70-71.) Afterwards, he sent her away. (RR4 71.)

SUMMARY OF THE ARGUMENT

Nelson v. State, which was relied upon by the court of appeals, was wrongly decided in the first instance, and this Court should overrule it. Moreover, the evidence in this case was sufficient to support the judgments because, in both everyday speech and the context of the victim's testimony, the jury would have understood that the victim referred to her breast when she said "chest." Furthermore, because the indecency-with-a-child statute now criminalizes touching the breast of all children under 17 years of age, definitions of breast that are limited to protuberant breasts—such as those in *Nelson*—undermine the modern statutory scheme.

ARGUMENT

I. The evidence is sufficient to uphold a conviction under § 21.11 of the Penal Code when a victim states that the defendant touched his or her "chest" rather than his or her "breast."

a. Section 21.11 and the opinion of the court of appeals

Appellant was found guilty of six counts of indecency with a child by contact. Under the applicable version of § 21.11 of the Penal Code, one committed that offense, in relevant part, if, intending to arouse or gratify the sexual desire of any person, he touched the breast of a child under the age of 17 and not his spouse, regardless of the sex of the child.[3] Tex. Penal Code Ann. § 21.11(a)(1), (c)(1) (West 2005). "Breast" is not defined by statute.

In the court of appeals, among other issues,[4] appellant attacked the sufficiency of the evidence concerning counts two, four, and six—the breast-touching offenses. Appellant argued that those counts were insufficient because K.E. never stated that appellant touched her breast. Instead, she only stated that

[3] The most current version of § 21.11 removes the spousal exception as a negative element of the substantive offense, and, instead, makes it an affirmative defense. Tex. Penal Code Ann. § 21.11(a), (b-1) (West Supp. 2017). It also expressly notes that the actor need not know the age of the child victim. *Id*. § 21.11(a) (West Supp. 2017). Thus, the most recent iteration of § 21.11 does not differ from the version that appellant was charged under in any manner relevant to the issue before this Court.

[4] On appeal, appellant also asserted that the evidence insufficiently supported the genital-touching counts, and that the trial court violated his right to confront a witness and erred by admitting outcry testimony. The court of appeals overruled those issues. *Arroyo v. State*, No. 04-15-00595-CR, 2017 Tex. App. LEXIS 6632, at *9-14 (Tex. App.—San Antonio July 19, 2017, pet. granted) (mem. op., not designated for publication).

appellant touched her "chest." Relying on *Nelson v. State*, 505 S.W.2d 551 (Tex. Crim. App. 1974), appellant argued that merely saying that a defendant touched the victim's "chest" is insufficient to uphold a conviction for touching the child's "breast." The court of appeals agreed. *Arroyo*, 2017 Tex. App. LEXIS 4684, at *5-9. Consequently, appellant's convictions for counts two, four, and six were reversed, and judgments of acquittal were rendered. *Id*. at *8-9, 14.

b. The holding of *Nelson v. State*

In *Nelson*, the defendant was convicted under article 535d, § 1 of the Revised Civil Statutes—a forerunner to § 21.11 of the Penal Code. As explained by the *Nelson* Court, article 535d, § 1, made it an offense, in relevant part, for a person to

> intentionally place or attempt to place his or her hands or any part of his hand or hands upon the breast of a female under the age of fourteen (14) years, or to in any way or manner fondle or attempt to fondle the breast of a female under the age of fourteen (14) years.

Nelson v. State, 505 S.W.2d 551, 552 (Tex. Crim. App. 1974) (quoting Tex. Rev. Civ. Stat. Ann. art. 535d, § 1, *repealed by* Acts 1973, 63rd Leg., ch. 399, § 1 (West 1974)).

Nelson was accused by his nine-year-old daughter of rubbing her chest. *Id*. The question before the *Nelson* Court was whether his daughter's statement "He

rubbed my chest" was sufficient proof to sustain the allegation that *Nelson* "place[d] his hand against the breasts of" the complainant. *Id*.

The *Nelson* Court noted that no statute defined "breast." *Id*. It therefore looked to dictionary definitions of both "breast" and "chest" to see if the two terms sufficiently overlapped. *Id*. "Breast," the Court observed, was defined by Webster's Third New International Dictionary as "either of the two protuberant milk-producing glandular organs situated on the front of the chest or thorax in the human female . . ." and also "The fore or ventral part of the body between the neck and the abdomen, the front of the chest." *Id*. "Chest," on the other hand, was defined as "the part of the body enclosed by the ribs and breast bone." *Id*. Thus, the Court concluded that "the definition of 'chest' is broader than the definition of 'breast' and includes a larger area of the body than that encompassed by the latter." *Id*. Accordingly, Nelson's conviction was reversed.

The lower court adopted *Nelson*'s reasoning without much analysis of the case other than to recite its facts and holding. *Arroyo*, 2017 Tex. App. LEXIS 4684, at *5-7. As outlined below, it should not have.

c. Standard of review – sufficiency of the evidence

When evaluating whether the evidence adduced at trial was legally sufficient to support the verdict, a reviewing court views "the evidence in the light most favorable to the verdict and determine[s] whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2014) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When evaluating the evidence, "the trier of fact may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence." *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014) (internal quotation marks and citations omitted). A reviewing court defers "to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) (internal quotation marks and citations omitted). A reviewing court "is not to become a thirteenth juror." *Id*. And it "may not re-evaluate the weight and credibility of the record evidence and thereby substitute [its] judgment for that of the fact finder." *Id*. Instead, the role of a reviewing court "is restricted to guarding against the rare occurrence when a factfinder does not act rationally." *Id*.

d. *Nelson* should be overruled

The State believes that *Nelson* was wrongly decided—or, at the very least, would be decided differently today under the *Jackson v. Virginia* sufficiency standard. It, thus, invites this Court to use this opportunity to overrule it.

Nelson, a sufficiency-of-the-evidence case, was decided at a time before *Jackson v. Virginia*, and it does not outline any standard of review, let alone the standard that requires looking at the evidence in a light most favorable to the verdict. Under this Court's modern sufficiency jurisprudence, there is little doubt that the context in which Nelson's daughter made her allegation that he touched her "chest" would have allowed the jury to rationally infer that he touched her breast, as alleged.

Nelson had only met his daughter a few months before the alleged abuse occurred. *Nelson*, 505 S.W.2d at 552. The victim testified that she was visiting him, and he asked her to unbutton her blouse and stated "that there was 'nothing to be afraid about' and that 'he was going to check [her] over.'" *Id*. When asked what Nelson did after her blouse was unbuttoned, the victim testified, "He rubbed my chest." *Id*. Viewing the evidence in a light most favorable to the verdict, a rational jury could easily have concluded that the victim was referring to her breast area when she said "chest."

To reach the result it did, the *Nelson* Court defined "breast" and "chest" in a way that reached an absurd conclusion as to what the victim was testifying about. Nelson's daughter certainly was not saying that he rubbed "the part of [her] body enclosed by the ribs and breast bone"—that is, the *inside* of her body. And, even then, it is hard to see how Nelson could touch his daughter's chest without touching her breast considering that, under its definitions of "breast," her breast would be on "the front of [her] chest."

Moreover, the modern rule is that, "[w]hen analyzing the sufficiency of the evidence, undefined statutory terms are to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance." *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011) (internal quotation marks omitted); *see also State v. Bolles*, No. PD-0791-16, 2017 Tex. Crim. App. LEXIS 1005, at *19 (Tex. Crim. App. Oct. 18, 2017). Under that rule, "chest" means "breast."

In the Merriam-Webster's Collegiate Dictionary,[5] "chest" is defined, in part, by adopting the definition of "breast." *Merriam-Webster's Collegiate Dictionary* 212 (11th ed. 2006). That is, Merriam-Webster's treats "chest" and "breast" as synonymous terms.

[5] When determining an undefined term's plain meaning, a reviewing court may consult dictionary definitions. *Bolles*, 2017 Tex. Crim. App. LEXIS 1005, at *19.

Other dictionaries also equate the terms. For instance, the New Oxford American Dictionary defines "breast" in part as "A person's chest," and "The corresponding part of a bird or mammal." *New Oxford American Dictionary* 213 (3rd Ed. 2010). Similarly, the Shorter Oxford English Dictionary defines "breast" in part as "the front of the human thorax, the chest." *Shorter Oxford English Dictionary* 285 (5th ed. 2002). Likewise, the American version of the online Oxford Living Dictionaries defines "breast" in part as "A person's chest," and "The chest of a bird or mammal." *Breast Definition*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/us/breast (last visited November 8, 2017).

The widely used Dictionary.com simply defines "breast" in part as "chest." *Breast Definition*, Dictionary.com, http://www.dictionary.com/browse/breast?s=t (last visited November 8, 2017).

A variety of thesauruses also list the terms as synonyms for one another. *E.g.*, *Oxford American Writer's Thesaurus* 102, 137 (2004); *Roget's International Thesaurus* 201 (5th Ed. 1992); *Oxford Thesaurus* 42, 60 (American Ed. 1992); J.I. Rodale, *The Synonym Finder* 132, 164 (1978). And the online Oxford Thesaurus and Thesaurus.com both list "chest" as a synonym for "breast." *Breast Synonyms*, Oxford English Thesaurus, https://en.oxforddictionaries.com/thesaurus/breast (last

visited November 8, 2017); *Breast Synonyms*, Thesaurus.com, http://www.thesaurus.com/browse/breast?s=t (last visited November 8, 2017).

Thus, because "chest" and "breast" are synonymous terms in "common parlance," *Nelson*'s holding that "chest" could not mean "breast" can no longer withstand scrutiny.

Nelson's holding also disregarded the rule that child complainants need not use precise language when describing the abuse inflicted upon them. The Court acknowledged that rule, but disregarded it with little to no analysis. *Nelson*, 505 S.W.2d at 552.

Simply, the jury made a rational inference about what Nelson's daughter was saying, and, accordingly, its conclusion should have been given its proper deference. Therefore, considering the deference given to the role of the factfinder in evaluating the evidence, it is hard to believe that *Nelson* would be decided the same way today. Consequently, it can and should be overruled by this Court.

e. The evidence in this case was sufficient to support the verdict

Without *Nelson*'s flawed holding, viewing the evidence in a light most favorable to the verdict, a rational juror could have concluded that K.E. meant "breast" when she testified appellant touched her "chest." Here, K.E. explained that appellant would perform a ritual of playing with her hair, rubbing her neck and back, touching her "chest," and then sliding his hand up her leg and beneath her underwear, culminating in stroking her vagina.

In the first incident, K.E. stated that appellant "started touching [her] chest," which she knew was so "wrong" that she began crying and told no one. (RR4 82.) Because appellant also touched K.E.'s vagina, the jury could rationally infer that this was not simply an incident of innocuous touching of body parts not delineated in § 21.11.

In the second incident, K.E. testified that appellant "moved down [her] neck and then . . . down [her] chest[.]" (RR4 86.) Thus, the implication is that appellant did not just stop at her shoulder, collarbone, or some other area not covered by § 21.11. When she said appellant moved down her chest, a rational juror would have understood that to mean her breast area. And, like the first incident, appellant eventually touched K.E.'s vagina. Thus, as before, it was part and parcel to a ritual of sexual abuse.

The third incident was like the others, with appellant touching various body parts, including K.E.'s "chest" and vagina. (RR4 88.) The court of appeals held that because K.E. confirmed that appellant molested her the same way during each incident (RR4 89), the jury could rationally infer that he rubbed her vagina during each encounter. *Arroyo*, 2017 Tex. App. LEXIS 6632, at *9. There is no reason that the same should not be true concerning the manner in which appellant touched her chest.[6]

Like the *Nelson* Court, the court of appeals acknowledged that, in a sufficiency review with a child complainant, "the question is whether the child sufficiently communicates to the trier of fact that sexual contact occurred by a touching of her breasts or genitals even though the language used by the child is different from that in the statute describing the part of the body." *Arroyo*, 2017 Tex. App. LEXIS 6632, at *7-8 (citing *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977)). It distinguished this case, however, because at the time K.E. testified she "was eighteen years old and, therefore, not an unsophisticated child-complainant." *Id*. at *8. This case offers a perfect example why this Court should not limit that rule to child complainants.

[6] As discussed in factual recitation, the jury also heard from G.S. about the abuse he inflicted upon her. Thus, the jury could have rationally concluded that appellant had a predilection to abuse young girls, and that he acted in conformity with that character when he abused K.E.

In everyday speech, people—particularly teenagers—use a variety of terms to describe the sexual parts of the body. *See Breast Synonyms*, Oxford English Thesaurus, https://en.oxforddictionaries.com/thesaurus/breast (last visited November 8, 2017) (listing a variety of expressions, including informal and vulgar slang terms, for "breast"). Adults can be just as unsophisticated as children when describing their bodies, particularly when they have suffered the trauma of sexual abuse.

The rule is premised on the notion that a "child may lack the technical knowledge to accurately describe parts of his or her body." *Clark*, 558 S.W.2d at 889. But in a sufficiency review it should not be the nomenclature used that matters; rather, it should be whether the factfinder can adequately understand the concept conveyed. Simply, there is no sound reason to think that a juror can understand a child who uses unsophisticated language but not an eighteen year old. Here, in the context of the ritualistic sexual abuse appellant committed against K.E., it defies all logic to think that, despite K.E.'s age, the jury here did not understand her to mean her "breast" area when she said "chest."

Accordingly, viewing the evidence in a light most favorable to the verdict, the jury, using its common sense and experience, rationally concluded that K.E.

was referring to her "breast" when she said that appellant touched her "chest." The court of appeals erred to hold otherwise and should, therefore, be reversed.[7]

[7] Even if this Court does not overrule *Nelson*, the level of detail provided by K.E. about the extent of the touching sufficiently distinguishes this case from that one such that the court of appeals should not have relied upon it. *See Echols v. State*, No. 11-12-00149-CR, 2013 Tex. App. LEXIS 10648, at *4-7 (Tex. App.—Eastland Aug. 22, 2013, pet. ref'd) (mem. op., not designated for publication) (holding that the evidence was legally sufficient to find the defendant touched the victim's breast even though she said "chest," and distinguishing *Nelson* because the victim's testimony was more specific).

II. Exclusive reliance on *Nelson*'s definitions would undermine the modern statutory scheme.

Nelson was not a statutory construction case. Nonetheless, it defined the statutory term "breast." But it did so while interpreting a statute quite different from later versions of the indecency-with-a-child statute. As a result, *Nelson*'s definitions are too limited to fit the modern statutory scheme. Instead, as used in § 21.11, the word "breast" requires broader definitions.

a. Standard of review – statutory construction

Statutory construction is a question of law reviewed *de novo*. *Cary v. State*, 507 S.W.3d 750, 756 (Tex. Crim. App. 2016). "In analyzing the language of a statute, [reviewing courts] seek to effectuate the collective intent or purpose of the legislators who enacted the legislation." *Id*. (internal quotation marks omitted) (quoting *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)). To do so, they "first look to the text of the statute and read words and phrases contained therein in context and construe them according to normal rules of grammar and usage." *Id*. "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Tex. Gov't Code Ann. § 311.011; *see also* Tex. Penal Code Ann. § 1.05(b) (stating that § 311.011 of the Government Code applies when interpreting the Penal Code).

"If the language of the statute is plain, [reviewing courts] will effectuate that plain language without resort to extra-textual sources." *Cary*, 507 S.W.3d at 756. "However, if an interpretation of the language would lead to absurd results or the language is ambiguous, then [they] may review extra-textual resources to discern the collective intent of the legislators that voted to pass the bill."[8] *Id*.

Extra-textual factors include, but are not limited to: (1) the object sought to be attained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency provision. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015).

As outlined below, relying exclusively on *Nelson*'s definitions when interpreting the modern versions of § 21.11 would undermine the purpose of the statute and lead to an absurd result that the legislature could not possibly have intended.

[8] This Court has recently granted review to determine whether resort to extra-textual resources is appropriate even in the absence of ambiguity or absurd results. *Lang v. State*, No. 03-15-00332-CR, 2017 Tex. App. LEXIS 4107 (Tex. App.—Austin May 5, 2017), *pet. granted*, No. PD-0563-17 (Tex. Crim. App. Oct. 4, 2017). Because that issue is still pending, this brief will proceed under the traditional standard of review outlined in *Boykin* and its progeny.

b. It is now a crime to touch the "breast" of all children with the requisite intent

The statute at issue in *Nelson* was very different than the applicable version of § 21.11 because it limited culpability to touching or fondling the breast of a female under the age of 14. *Nelson*, 505 S.W.2d at 552. Relatedly, as noted by the *Nelson* Court, the legislature thereafter repealed that statute and enacted new statutory language, defining "sexual contact" therein as "any touching of . . . the breast *of a female* 10 years or older" with the requisite intent. *Nelson*, 505 S.W.2d at 552 n.1 (quoting Tex. Penal Code Ann. §§ 21.01, 21.11 (West 1974) (emphasis added)). Thus, previous versions of the indecency-with-a-child statute focused on touching the breasts of girls.

However, later iterations of § 21.11 did not limit sexual contact to young girls. In 1979, the legislature amended § 21.01—which at the time contained the definition of "sexual contact" used in § 21.11—to delete any reference to a specific gender. Act of May 4, 1979, 66th Leg., R.S., ch. 168, § 1, 1979 Tex. Gen. Laws 373, 373 (current version at Tex. Penal Code Ann. § 21.01(2) (West 2011 & Supp. 2017)). The accompanying bill analysis made it clear that the statute intended to "delete the references to age and gender in the definitions of sexual contact." House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 43, 66th Leg., R.S. (1979). Since that time, the definition of "sexual contact" in neither § 21.01 nor § 21.11 has referenced the gender of the child. Thus, unlike the statute at issue

in *Nelson*, it is now a crime to touch (with the requisite intent) the breast of either a female or male child. Tex. Penal Code Ann. § 21.11(a).

c. Meaning of the word "breast" under § 21.11

Nelson's definitions are too limited to be relied upon when interpreting § 21.11. Its first definition—"either of the two protuberant milk-producing glandular organs situated on the front of the chest or thorax in the human female"—is not necessarily incorrect, except that it distinguishes between a breast and chest. Likewise, its second adopted definition—"The fore or ventral part of the body between the neck and the abdomen, the front of the chest"—distinguishes the two. As delineated above, the distinction between "chest" and "breast" is largely irrelevant in modern language, and the reality is that no boy is going to testify that someone touched his "breast." Instead, boys are going to refer to their breast area as their chest. Thus, to the extent that a definition relies on such a distinction, it is incompatible with § 21.11.[9]

Furthermore, the first definition expressly referenced "human female[s]." Such reliance on gender-specific distinctions made sense at a time when one could only commit breast-touching offenses against females. And, certainly, it is still a

[9] The second definition has been slightly reformed. It is very similar to Merriam Webster's current definition—"The fore or ventral part of the body between the neck and the abdomen"—but the newer definition makes no distinction between a breast and chest. *See Merriam Webster's Collegiate Dictionary* 152 (11th ed. 2009); *see also Chambers v. State*, 502 S.W.3d 891, 894 n.6 (Tex. App.—Texarkana 2016, pet. ref'd) (noting the definition from Merriam Webster's 11th edition).

valid definition of "breast." *See Webster's New College Dictionary* 180 (2009) (defining "breast" in part as "either of two milk-secreting glands protruding from the upper, front part of a woman's body"). But, while it remains an appropriate definition for girls who have developed breasts, with a broader statutory focus, it is too limited to be relied upon alone.

For instance, Webster's New College Dictionary goes on to define "breast" as "a corresponding undeveloped gland in the male." *Id*. Thus, while boys do not develop breasts in the conventional sense, they do have a breast. Accordingly, because the legislature has abrogated the distinction between boys and girls but has kept the term "breast" in the statute, there must have been an intention to expand the meaning of that term from *Nelson*'s first definition.

Likewise, if "breast" really were such a circumscribed term, it would not cover girls that have not yet developed breasts. It would be odd indeed if the legislature meant to criminalize touching a developed breast, but not an undeveloped chest.

Consequently, when interpreting § 21.11, a variety of definitions of "breast" may be appropriate. But considering that "the object of the statute is to protect children," *Chambers*, 502 S.W.3d at 894, any definition used must be broad enough to cover boys, undeveloped girls, and developed girls, all of whom the modern statute protects.

Here, at the time appellant violated K.E., she was around nine or ten years old. It is irrelevant whether she had yet developed protuberant breasts or not. What is relevant is that she indicated that appellant touched her breast area with the requisite intent. Therefore, the court of appeals should be reversed and the trial court's judgments of conviction should be reinstated.

PRAYER FOR RELIEF

Counsel for the State prays that this Honorable Court REVERSE the court of appeals regarding counts two, four, and six, and AFFIRM it in all other respects.

Respectfully submitted,

Nicholas "Nico" LaHood
Criminal District Attorney
Bexar County, Texas

/s/*Andrew N. Warthen*
Andrew N. Warthen
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva Street
San Antonio, Texas 78205
Phone: (210) 335-1539
Email: awarthen@bexar.org
State Bar No. 24079547

Attorneys for the State

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this brief is 4,940. I also certify that a true and correct copy of this brief was emailed to appellant David Arroyo's attorney, Andrea C. Polunsky, at apolunsky@gmail.com, and to Stacey Soule, State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov, on this the 8th day of November, 2017.

/s/*Andrew N. Warthen*
Andrew N. Warthen
Assistant Criminal District Attorney

Attorney for the State